STAT

PRELIMINARY DRAFT OF PROPOSED NEW AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

NOTICE

Public hearings will be held
on February 13, 1987 in
Washington, D. C.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER 1986

PROPOSED NEW AMENDMENT
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.3. Notice of Defense Based Upon Public Authority

(a) NOTICE BY DEFENDANT; GOVERNMENT RESPONSE; FILING OF WRITTEN STATEMENTS.

(1) Defendant's Notice and Government's Response. A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall summarize the facts supporting the defense and identify the law enforcement or federal intelligence agency on behalf of which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before trial, the attorney for the government shall serve upon the defendant or the defendant's attorney a written

response setting forth the government's position regarding the defense summarized in the notice.

(2) Written Statements. At the time that the government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense summarized in the notice. Within seven days after receiving the government's demand, the defendant shall serve upon the attorney for the government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the government intends to rely in opposing the defense summarized in the notice.

(b) CONTINUING DUTY TO DISCLOSE. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.

(c) FAILURE TO COMPLY. If a party fails to comply with the requirements of this rule, the court may, for good cause shown, allow a late filing of a notice, response or written statement, grant additional time to the other party to prepare for trial, exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.

(d) PROTECTIVE PROCEDURES UNAFFECTED. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.

(e) INADMISSIBILITY OF WITHDRAWN DEFENSE BASED UPON PUBLIC AUTHORITY. Evidence of an intention to rely upon a defense based upon public authority, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

Subdivision (a). There has been an increase in the number of cases in which defendants have claimed that they were secretly involved with the government at the time of the offenses charged against them. See, e.g., United States v. Sampol, 636 F.2d 621, 630 (D.C. Cir. 1980); United States v. Wilson, 721 F.2d 967, 974 (4th Cir. 1983). Although the defense of public authority has been raised more frequently in recent years, it still remains an unusual defense. Thus, the government rarely will have reason to anticipate it. Without a notice provision, the government may be unfairly surprised at trial by a public authority defense. Thus, Rule 12.3 has been drafted to deal with a problem that is similar to the problems addressed by Rules 12.1 (Notice of Alibi) and 12.2 (Notice of Defense Based Upon Mental

Condition). The rationale of both those rules—i.e., notice is needed to avoid unfair surprise and to permit adequate preparation—also supports Rule 12.3.

The rule covers all defenses based upon a claim that a defendant actually exercised the public authority of a law enforcement or federal intelligence agency at the time of an alleged offense and all defenses based upon a claimed belief that the defendant was exercising such authority. "Law enforcement agency" is worded broadly to cover any agency whose authority the defendant claims to have been exercising—federal, state, local, international, or foreign.

Because of the obvious sensitivity of intelligence information, the rule requires that the notice given by the defendant be under seal when the defense identifies any such agency in its notice. This protects not only the agency, but also the individuals whom the defendant lists as witnesses. There is no requirement that notices claiming reliance on public authority of law enforcement agencies that are not intelligence agencies be under seal, but subdivision (d) clearly indicates that the court retains its traditional power to enter orders that are needed in the interests of justice. Such power would be broad enough to support the sealing of other notices in particular cases where good cause is shown for protecting sensitive information from disclosure.

Subdivision (a)(1) imposes the initial burden of giving notice with respect to the defense upon the defendant. The rule requires that the notice be filed at the time provided for pretrial motions, unless the court fixes another time. The intent is to assure that the parties and the court are aware of the defendant's intention to raise the defense so that delays can be avoided and a speedy trial can be provided without prejudicing either party. The notice requires the defendant to summarize the defense and to identify the agency whose authority is implicated in the defense. Once the defendant gives notice, the government must respond within ten days and no later than twenty days prior to trial. The government's response must state its position regarding the defense summarized in the notice. Thus, the government bears a burden equal to that imposed upon the defendant. See generally Wardius v. Oregon, 412 U.S. 470 (1973).

To assure that the court is aware that a defense based upon public authority will be raised, a defendant's notice must be filed with the clerk. The rule does not require that the government's response or any subsequent exchange of witness information be filed. Generally, discovery exchanges under the Federal Rules of Criminal Procedure are not automatically filed with the court. See, e.g., Fed. R. Crim. P. 12.1, 12.2.

Rule 12.3 borrows from the approaches taken in Rules 12.1 and 12.2. As noted above, it places the burden on a defendant who intends to raise a public authority defense to give notice of this intention. In this respect Rule 12.3 is similar to Rule 12.2. Rule 12.3 is also similar to

Rule 12.1 in requiring the defendant to identify the names and addresses of witnesses upon whom the defense will rely only if the government demands discovery from the defendant. The theory of the rule is that in many cases the government will only be able to prepare to rebut a public authority defense by seeking information from the public agency upon which the defendant relies and by endeavoring to find out the nature of the evidence defense witnesses will offer. To assure that the government is not the victim of unfair surprise and that trial need not be delayed as a result of surprise, subdivision (a)(2) provides the government with the right to demand a written statement of names and addresses of any witnesses the defendant will rely upon to establish the defense. Once the defendant submits a written statement, the government must do likewise. Thus, discovery is reciprocal. See Wardius v. Oregon, supra.

If the government chooses not to demand the names and addresses of witnesses, neither party is required to provide this information. The government may choose to forego a demand if it believes that a proposed defense is frivolous or easily rebutted and that disclosure of names and addresses might pose a threat to law enforcement and security interests that is greater than any advantage it might receive from making a demand.

Subdivision (b). The continuing duty to disclose is the same duty imposed by Rule 12.1(c). Late discovery of witnesses always has the tendency to be disruptive, but subdivision (b) is an effort to reduce the disruption by requiring prompt efforts to disclose newly discovered witnesses.

Subdivision (c). The court may authorize a late filing of a notice, response, or written statement for good cause shown. This authority is also provided in Rule 12.1(e). When a party has failed to comply with the notice requirements, the court is authorized to grant a continuance so that the opposing party may avoid the surprise and unpreparedness which the rule is intended to protect against.

Speedy trial problems may occur when the government fails to follow the rule, and the court may be called upon to decide whether a continuance following a failure by the government to comply with the rule would violate the Sixth Amendment. If the defendant fails to comply with the rule, a continuance on behalf of the government is not likely to violate the speedy trial guarantee.

The rule permits the judge to exclude witnesses other than the defendant when their identities have not been disclosed as required. Whether or not exclusion is necessary to protect another party may depend on when the violation of the rule is detected and the extent to which the other party is prejudiced by the violation. Guidance may be found in cases discussing the propriety of excluding witnesses under Rule 12.1(e). See, e.g., United States v. Burkhalter, 735 F.2d 1327, 1329 (11th Cir. 1984).

States v. Myers, 550 F.2d 1036 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978).

It is possible that preclusion of testimony may violate the defendant's compulsory process right. The Supreme Court has not yet addressed this possibility. See, e.g., Taliaferro v. Maryland, 456 A.2d 29 (Md. App.) cert denied, 461 U.S. 948 (1983) (White, J., joined by Brennan and Blackmun, J.J., dissenting). Because the law is unclear as to whether a defendant may be precluded from testifying as a sanction for failing to give notice, Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982), this rule, like Rule 12.1(d), provides that the court may not bar the defendant from testifying as to the defense, even though the notice required by the rule has not been given.

Should the defendant surprise the government, however, by personally testifying to a defense of public authority, the court may grant the government a continuance to enable it to prepare. If the continuance would disrupt a trial, the court may consider the possibility of granting a mistrial. It is unlikely that double jeopardy problems would be created where the mistrial resulted from the defendant's failure to give the required notice. See Arizona v. Washington, 434 U.S. 487 (1978).

Nothing in the rule limits impeachment that would otherwise be permitted by the government or by the defense. Thus, the failure to give notice might be the proper subject of cross-examination. See Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (recognizing that a defendant who takes the stand may be questioned about a prior failure to make a statement). As the Supreme Court said in United States v. Nobles, 422 U.S. 225, 241 (1975), "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." The impeaching party may be able to argue that the fact finder should draw an adverse inference where such an inference would be rational under the circumstances.

As long as the right of the defendant to testify is respected, the rule expressly permits the court to enter any other order that is appropriate under the circumstances when there has been a failure of a party to comply with the requirements of the rule.

Subdivision (d) establishes that the court retains authority to issue protective orders with respect to pleadings and papers not required by this rule to be under seal. The rule protects against surprise if a public authority defense is raised, but it does not guarantee that a defendant will be able to rely upon any and all classified information or to present it at trial without restriction. The rule complements the Classified Information Procedures Act, 18 U.S.C. App. § 6(e).

Subdivision (e) is consistent with Rules 12.1(f) and 12.2(e) in providing that evidence of an intention to rely on a defense is not admissible in any civil or criminal proceeding when the defendant withdraws the defense. Self-incrimination problems are avoided when the defendant is permitted to withdraw without penalty a defense for which notice was required. Williams v. Florida, 399 U.S. 79, 84 & n.15 (1970).